No. 15-674

Supreme Court, U.S.
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In The
Supreme Court of the United States

UNITED STATES, *et al.*,

Petitioners,

v.

TEXAS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* N.C. LIEUTENANT GOVERNOR DANIEL J. FOREST IN SUPPORT OF RESPONDENTS

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Interest in Filing Brief[1]

As the Lieutenant Governor of North Carolina, Dan Forest serves in multiple state constitutional and statutory capacities. Pursuant to the North Carolina Constitution, the Lieutenant Governor serves as a voting member of the North Carolina State Board of Education. N.C. Const. Art. IX, § 4. In that duty, the Lieutenant Governor votes on and assists in the preparation of proposed budgets for North Carolina's public schools. Additionally, the Lieutenant Governor sits as a voting member of the North Carolina Board of Community Colleges. N.C. Gen. Stat. § 115D-2.1(b) (2015). In doing so, the Lieutenant Governor votes on and assists in the preparation of proposed budgets for North Carolina's network of community colleges.

Illegal immigration directly impacts both of these functions. In the budgetary process it becomes difficult to account for numerous illegal and undocumented immigrants that go to North Carolina's public schools and community colleges. As executive policies on illegal immigration become more lax, it encourages additional illegal immigration which compounds this difficulty. This is

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

especially exacerbated when the highest executive official in the land, the President of the United States, issues a policy to agencies under his control instructing them to no longer follow a law duly enacted by Congress.

As a citizen and elected official who has taken an oath to uphold the Constitution and the laws of this nation and state, Lieutenant Governor Dan Forest has an interest in demonstrating that the oath of office means what it says for all elected officials.

Issue Briefed

This brief will only focus on the additional issue upon which this Court requested briefing, whether President Obama's unilateral action instructing agencies under his control to no longer enforce a law duly enacted by Congress (the directive, or as it is referred to by petitioners, the guidance) violates the provision of the United States Constitution that the president "shall take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3.

Statement of the Case

On November 20, 2014 the Executive Branch issued a directive announced by President Barack Obama that had two main objectives: (1) expand the Deferred Action for Childhood Arrivals (DACA) program and (2) establish a new program known as the Deferred Action for Parents of Americans and Lawful Permanent Residents, often referred to as

"DAPA". *See* Department of Homeland Security Secretary Jeh Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, (Nov. 20, 2014) *available at* https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. This directive orders Department officials to no longer enforce certain provisions of Title 8 of the United States Code.

On December 3, 2014, respondents brought suit alleging DAPA violates the Administrative Procedure Act, 5 U.S.C. §§ 553, 706 (APA), and the Take Care Clause of the Constitution, Art. II, § 3, Cl. 5. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) The district court granted plaintiffs request for a preliminary injunction, thereby halting the implementation of the program. *Id.* The defendants appealed to the Fifth Circuit where their stay motion was denied. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) Following oral arguments, the Fifth Circuit affirmed the district court's preliminary injunction. *Id.* This honorable Court granted certiorari. *United States v. Texas*, __ U.S. __, 2016 U.S. Lexis 841, 84 U.S.L.W. 3405 (2016).

Summary of the Argument

The plain meaning of the Take Care Clause prevents the President from unilaterally voiding or otherwise ignoring laws that have been duly enacted by Congress and signed into law. Additionally, the participants at the Constitutional Convention clearly rejected an absolute negative being wielded by the executive, and necessarily that rejection would

preclude the use of an absolute negative after an act of Congress has already become law. Finally, the weight of the somewhat sparse case law surrounding the interpretation of the Take Care Clause clearly demonstrates that the executive action in this case violates the Constitution.

Argument

The plain meaning of the Take Care Clause, a review of the Constitutional Convention, and the overwhelming authority of case law demonstrate that the President's action violates the Take Care Clause.

First, the plain meaning of the Take Care Clause prevents the President from unilaterally voiding laws duly enacted. From the foundation of this honorable Court's constitutional jurisprudence, the Court has been steadfast in the interpretational principle that the plain meaning of the words of the Constitution is what controls. *Briscoe v. President & Dirs. of Bank of Ky.*, 36 U.S. 257, 311 (1837) ("Will not this Court limit the constitution to its plain meaning, and its evident interpretation?"). The plain meaning of the mandate of the Constitution that the president "shall take Care that the Laws be faithfully executed" is apparent from the words used. The president has a duty to work towards the enforcement of any law that is duly enacted by Congress and has been signed by the president at the time the law was passed. The balance and separation of powers are clear when the context of the Constitution is taken as a whole. Article I spells out the powers of Congress to make laws, including

the power to "establish a uniform Rule of Naturalization." U.S. Const. Art. I § 8. This necessarily includes the power to establish laws regulating the immigration policy of the United States. In the event the president disagrees with the policy set forth by Congress, he has the authority to veto such an act at the time of passage, subject to congressional override. U.S. Const. Art. I § 7. In the event the president objecting to the law was not the president at the time, absent some alleged constitutional violation in the law that the judiciary can resolve, he is left with a single recourse—seeking congressional repeal of the law or a change in its effect by congressional action. The Constitution does not support the idea that federal law is an all-you-can-eat buffet that the president may pick through to determine what he will enjoy on a specific day.

Associate Justice Joseph Story made it abundantly clear the Take Care Clause is at the heart of the rule of law and is a foundational pillar of good and effective government.

> [T]he duty imposed upon him to take care, that the laws be faithfully executed, follows out the strong injunctions of his oath of office, that he will "preserve, protect, and defend the constitution." The great object of the executive department is to accomplish this purpose; and without it, be the form of government whatever it may, it will be utterly worthless for offence, or defence; for the redress of grievances, or

> the protection of rights; for the happiness, or good order, or safety of the people.

3 Joseph Story, *Commentaries on the Constitution of the United States; with a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution* 576 (1833).

President Obama made a great case for this constitutional provision being interpreted by its plain meaning on numerous occasions. In an interview in October of 2010 with Univision, President Obama stated:

> But the most important thing that we can do is to change the law because the way the system works – again, I just wanna repeat, I'm president, I'm not king. If Congress has laws on the books that says that people who are here who are not documented have to be deported, then I can exercise some flexibility in terms of where we deploy our resources, to focus on people who are really causing problems as a opposed to families who are just trying to work and support themselves. But there's a limit to the discretion that I can show because I am obliged to execute the law. That's what the Executive Branch means. I can't just make the laws up by myself.

Eddie Sotelo, *Interview with the President of the United States Barack Obama, Univision Radio* (Oct. 25, 2010), *transcript available at* http://latimesblogs.latimes.com/washington/2010/10/transcript-of-president-barack-obama-with-univision html. Again, at a March 2011 town hall, President Obama stated:

> [W]e've got three branches of government. Congress passes the law. The executive branch's job is to enforce and implement those laws. And then the judiciary has to interpret the laws. There are enough laws on the books by Congress that are very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President.

Remarks at an Univision's "Es el Momento" Town Hall Meeting and a Question-and-Answer Session, 2011 Daily Comp. Pres. Doc. 205 (Mar. 28, 2011). There are myriad other examples that will not be quoted for the sake of space.

This plain meaning and the doctrine of separation of powers is so simple that it can be easily explained by reference to a third-grade civics book. "The first branch created by the Constitution is the legislative branch, called Congress, which makes the laws . . . . The second branch created by the Constitution is the executive branch . . . . The

Constitution gives the president the job of carrying out the laws that Congress makes." Syl Sobel, *The U.S. Constitution and You*, 14-16 (2001).

It is clear that if the Take Care Clause means anything, it means that the president's duty is to enforce the laws duly enacted. Clearly it violates the president's constitutional duty when he declares a law modified or effectively repealed by a stroke of the executive pen.

Second, the type of power that President Obama seeks to wield in this case was considered by the Constitutional convention and expressly rejected. During the discussion of what would ultimately become the veto power of the president, it was suggested by Elbridge Gerry's motion concerning an executive negative over the legislature that the text read: "The national executive shall have a right to negative any legislative act which shall not be afterwards passed by – parts of each branch of the national legislature." 5 Jonathan Elliot, *Debates on the Adoption of the Federal Constitution, in the Convention Held at Philadelphia in 1787; with a Diary of the Debates of the Congress of the Confederation as Reported by James Madison, a Member and Deputy from Virginia* 151 (Rev. Ed. 1845). James Wilson and Alexander Hamilton then moved to strike the language that stated "which shall not be afterwards passed by – parts of each branch of the national legislature." *Id.* To be clear, Mr. Wilson and Mr. Hamilton's motion would have given the national executive an absolute negative on any law passed by the national legislature.

This proposal sparked much debate, including Benjamin Franklin's warning concerning such a provision and Roger Sherman's statement that no one man should be able "to stop the will of the whole," as "[n]o one man could be found so far above all the rest in wisdom." *Id.* at 152. The convention voted unanimously to reject Wilson and Hamilton's amendment. *Id.* at 154.

Following this debate, Pierce Butler moved to allow the executive the power to suspend any legislative act for a certain term. *Id.* With very little debate, that motion was unanimously rejected. *Id.* at 155. Finally, it was decided that the president could negative a law passed, but that the negative could be overruled by the vote of two-thirds of each house of the legislature. *Id.*

The convention unanimously rejected an absolute negative or power of suspension of laws being wielded by the executive branch at the time that Congress passed the laws. The power that President Obama seeks to wield in the case *sub judice* is much more expansive than the power rejected at the convention. In essence, President Obama seeks to wield the power of an ex post facto veto, the power to veto laws that have been enacted by prior congresses and signed by prior presidents. This Court should not set a precedent that a president may have an absolute negative over laws passed years and even decades before he takes office. Could a president order the Internal Revenue Service to no longer collect certain types of statutorily required taxes? Could the next president order the Internal Revenue Service to refuse to

enforce the individual mandate tax of the Patient Protection and Affordable Care Act? Could a president three decades from now order Immigration and Customs Enforcement to no longer execute a congressionally-mandated embargo? These questions hang in the balance as this honorable Court determines the present issue.

Finally, judicial opinions on the Take Care Clause demonstrate the unconstitutionality of the President's action directing his agency to dispense with the law. Supreme Court jurisprudence interpreting the Take Care Clause has been somewhat sparse. This is not surprising considering the simplicity of the clause's language and the nearly uniform actions of the prior forty-three presidents to follow the laws duly enacted by Congress. However, the few instances of federal case law on the subject make it clear that the president does not have the power to forbid the execution of the law.

In an early 19th Century case, this Court expressly rejected such a theory of the Take Care Clause. "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Kendall v. United States*, 37 U.S. 524, 613 (1838). This Court further clarified the delineation of federal power in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking

process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." *Id.* at 587.

Other federal courts have followed suit. *See National Treasury Emp. Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974) (the Take Care Clause "does not permit the President to refrain from executing laws duly enacted by the Congress as those laws are construed by the judiciary."); *see also U.S. v. Cox*, 342 F.2d 167 (5th Cir. 1965), *cert. denied*, 381 U.S. 939; *Ameron, Inc. v. U.S. Army Corps of Engineers*, 610 F. Supp. 750 (Dist. N.J. 1985), *affirmed as modified on other grounds*, 787 F.2d 875, *on reh'g*, 809 F.2d 979, *cert. granted*, 485 U.S. 958, *cert. dismissed*, 488 U.S. 918.

Conclusion

The clear weight of the plain meaning of the Take Care Clause, the specific rejection by the Constitutional convention of the use of an absolute negative, and the overwhelming weight of the case law demonstrate that President Obama's failure to execute the law duly enacted by Congress through his policy directive violates the Take Care Clause of the Constitution. The decision of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

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